Checkbook Journalism: It May Involve Free Speech Interests but It Is *Not* Free; Can Witnesses Be Prohibited from Selling Their Stories to the Media Under the First Amendment?

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I. INTRODUCTION

A woman witnesses a white Ford Bronco resembling the vehicle of a defendant in a high-profile double-murder case driving recklessly near the scene of the crime on the night of the murders. The woman is paid $5000 to tell her story on *Hard Copy*, a television tabloid show, and $2600 to recount her story for the *Star*, a supermarket tabloid newspaper. Afterwards, the prosecution declines to call the woman to testify at the grand jury proceeding because she now lacks credibility due to the profitable deal she made with the media.[1]

In response to situations such as these, the California State Legislature enacted legislation that prohibits a witness to a criminal event or occurrence from accepting or receiving any compensation in exchange for providing information obtained as a result of witnessing that event or occurrence.[2]

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[1] This incident occurred in the much publicized O.J. Simpson double-murder case, People v. Simpson, No. BA097211 (Cal. Oct. 3, 1995). *See* Robin Clark, *Tabloids Are Paying, but at a Cost: Journalism by Checkbook Is a Big Problem in High-Profile Cases*, PHILADELPHIA INQUIRER, July 3, 1994, at C1, C8; Henry Weinstein, *Free-Spending Tabloid Media Causing Judicial Concerns*, L.A. TIMES, July 2, 1994, at A1, A2.

[2] CAL. PENAL CODE § 132.5 (Deering 1995). The statute reads in pertinent part:

> §132.5. Disclosure of information relating to crime by prospective witnesses for valuable consideration
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> (a) The Legislature supports and affirms the constitutional right of every person to communicate on any subject. This section is intended to preserve the right of every accused person to a fair trial, the right of the people to due process of law, and the integrity of judicial proceedings. This section is not intended to prevent any person from disseminating any information or opinion. The Legislature hereby finds and declares that the disclosure for valuable consideration of information relating to crimes by prospective witnesses can cause the loss of credible evidence in criminal trials and threatens to erode the reliability of verdicts. The Legislature further finds and declares that the disclosure for valuable consideration of information relating to crimes by

Witnesses who violate California Penal Code section 132.5 face penalties of up to six months in jail and a fine of up to three times the compensation they received for their information.[3] The statute does not prohibit witnesses from divulging information if they do not receive any payment.[4]

The O.J. Simpson double-murder case[5] prompted intense media coverage,

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prospective witnesses creates an appearance of injustice that is destructive of public confidence.

(b) *A person who is a witness to an event or occurrence that he or she knows is a crime or who has personal knowledge of facts that he or she knows or reasonably should know may require that person to be called as a witness in a criminal prosecution shall not accept or receive, directly or indirectly, any money or its equivalent in consideration for providing information obtained as result of witnessing the event or occurrence or having personal knowledge of the facts.*

(c) *Any person who is a witness to an event or occurrence that he or she reasonably should know is a crime shall not accept or receive, directly or indirectly, any money or its equivalent in consideration for providing information obtained as a result of his or her witnessing the event or occurrence.*

Id. (emphasis added).

[3] The statute reads in pertinent part:

(d) The Attorney General or the district attorney of the county in which an alleged violation of subdivision (c) occurs may institute a civil proceeding. Where a final judgment is rendered in the civil proceeding, *the defendant shall be punished for the violation of subdivision (c) by a fine equal to 150 percent of the amount received or contracted for by the person.*

(e) *A violation of subdivision (b) is a misdemeanor punishable by imprisonment for a term not exceeding six months in a county jail, a fine not exceeding three times the amount of compensation requested, accepted, or received, or both the imprisonment and fine.*

(f) This section does not apply if more than one year has elapsed from the date of any criminal act related to the information that is provided under subdivision (b) or (c) unless prosecution has commenced for that criminal act. If prosecution has commenced, this section shall remain applicable until the final judgment in the action.

Id. (emphasis added).

[4] CAL. PENAL CODE § 132.5(a) ("This section is not intended to prevent any person from disseminating any information or opinion."). Furthermore, this statute does not prohibit witnesses from selling their stories after the trial. *Id.* For text from this statute, see *supra* note 2.

[5] O.J. Simpson, a former NFL star turned actor and company spokesperson, was charged with killing his ex-wife Nicole Brown Simpson and her friend Ronald Goldman on June 12, 1994 in front of Nicole's Brentwood condominium. People v. Simpson, No.

ultimately affecting the investigation of the crime.[6] Subsequently, Assembly Speaker Willie Brown introduced this legislation in an effort to stop the media's attempts to use financial incentives, known as checkbook journalism,[7] to gain information in high-publicity cases like the Simpson case.[8] Speaker Brown has said that he believes when witnesses are offered money in exchange for divulging their testimony to the media, some witnesses are motivated to lie or embellish their stories.[9] Proponents of the law fear that these media payments create doubts in jurors' minds about a witness's credibility,[10] and thus, guilty individuals might be acquitted, or conversely, innocent individuals could be convicted if important witnesses are compromised by selling their stories to the press.[11]

This legislation is the first of its nature to be enacted in the United States.[12] Consequently, no case law exists which interprets the legislation or examines its constitutionality. Many legal scholars have criticized the legislation as a restraint on the freedom of speech[13] guaranteed in the First Amendment to the

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BA097211 (Cal. Oct. 3, 1995).

[6] *Gov. Gets Checkbook Journalism Bills*, UPI, Aug. 31, 1994, *available in* LEXIS Nexis Library UPI File. Several witnesses sold their stories to the tabloid media and thus cast doubts on their credibility. See introductory paragraph *infra* part I for example. Brian "Kato" Kaelin, Simpson's houseguest, is another witness that has profited by divulging information about the case. *See* KATO KAELIN, KATO KAELIN: THE WHOLE TRUTH (1995) (chronicling his relationships with O.J. Simpson and Nicole Brown Simpson).

[7] *See generally* Louise Mengelkoch, *When Checkbook Journalism Does God's Work*, COLUM. JOURNALISM REV., Nov.-Dec. 1994, at 35. "'Checkbook journalism' has become the buzzword for the unsavory practice of paying Michael Jackson's personal servants, or Bill Clinton's bodyguards, or the store clerk who sold O.J. Simpson a knife to tell all, whether it's true or not." *Id.*

[8] *Gov. Gets Checkbook Journalism Bills*, *supra* note 6.

[9] *California Moves to Silence Witnesses Before Trial*, REUTERS, Aug. 30, 1994, *available in* LEXIS, Nexis Library, UPI File.

[10] Erwin Chemerinsky, *Should Witnesses Be Allowed to Sell Their Stories Before the Trial?; Yes: There is Insufficient Cause to Override the First Amendment and Ban the Selling of Stories for Profit*, L.A. TIMES, Aug. 22, 1994, at B7.

[11] *Id.*

[12] However, Representative Marilyn J. Reid, an Ohio legislator, introduced 1995 OH H.B. 41, legislation mirroring that of California to be adopted in Ohio. *See* Catherine Candisky, *Law Would Bar Selling Testimony: Legislator Wants to Prevent Tainting of Criminal Trials*, COLUMBUS DISPATCH, Feb. 2, 1995, at D3. Similar legislation has been proposed in several other states as well. *See* 1995 IL S.B. 344; 1995 MA S.B. 878; 1994 NJ A.B. 2208.

[13] *Simpson-Inspired Bill Moves Ahead*, UPI, Aug. 16, 1994, *available in* LEXIS, Nexis Library, UPI File.

United States Constitution.[14] First Amendment advocates have expressed concern that the legislation is too broad and therefore may be unconstitutional.[15] One legal scholar has even opined that the First Amendment demands that restrictions on speech be justified by more than a hypothesized harm and a distaste for the media's checkbook journalism practices.[16]

Speaker Brown maintains that California Penal Code section 132.5 does not violate free speech interests because the legislation is narrowly tailored to protect the right of a defendant to a fair trial and the right of witness to free speech.[17] Moreover, the California State Legislature has justified the legislation on Sixth Amendment grounds by claiming that the statute is necessary to ensure a fair trial for criminal defendants.[18]

This Note will address the issue of whether California Penal Code section 132.5 violates the First Amendment to the United States Constitution. Part II of this Note will analyze the statute under the doctrine of prior restraint to determine if the statute is necessary to promote the government's interest in ensuring a fair trial by averting the effects of prejudicial pretrial publicity. Part III will be a study of content-based regulations. This study will include an analysis of the California statute under the strict scrutiny standard of content-based regulations, scrutinizing in particular the government's interest in maintaining a fair trial by preventing dishonest testimony and increasing the jurors' confidence in the testimony of key witnesses. Part IV discusses whether the speculative benefits that the legislation provides are sufficient to justify its burden on freedom of speech. Finally, Part V will reiterate the reasons why the statute is unconstitutional under the freedom of speech clause of the First Amendment and will suggest alternatives that courts can utilize which are less intrusive upon freedom of speech than California's legislation.

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[14] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

[15] *Gov. Gets Checkbook Journalism Bills*, *supra* note 6.

[16] Chemerinsky, *supra* note 10, at B7.

[17] *Brown Discusses Proposal to Outlaw Checkbook Journalism* (CNN television broadcast, July 29, 1994).

[18] *See* CAL. PENAL CODE § 132.5(a) ("The Legislature . . . finds and declares that the disclosure for valuable consideration of information relating to crimes by prospective witnesses can cause the loss of credible evidence in criminal trials and threatens to erode the reliability of verdicts. . . . [and] creates an appearance of injustice that is destructive of public confidence."). For text from this statute, see *supra* note 2.

II. THE PRIOR RESTRAINT DOCTRINE

A. *First Amendment Introduction*

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[19] Incorporation of the First Amendment into the Fourteenth Amendment requires that the First Amendment restrictions apply with equal force to the states.[20]

B. *Prior Restraint*

The United States Supreme Court has consistently extended First Amendment protection to speakers[21] and their channels for speech.[22] However, First Amendment protection of listeners' rights has been ambiguous.[23] Thus, First Amendment doctrines remain primarily communicator-oriented.[24] In

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[19] U.S. CONST. amend. I.

[20] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

[21] The Court's protective stance toward speakers is most evident in its protection of unpopular or offensive speakers. *See* Cohen v. California, 403 U.S. 15 (1971) (jacket bearing "Fuck the Draft" message is protected by the First and Fourteenth Amendments); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech of Ku Klux Klan member can be restricted only when the danger of inciting a crowd to violence is substantial and imminent); *see also* Texas v. Johnson, 491 U.S. 397 (1989) (burning of flag is expressive activity that is protected by the First Amendment); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (Nazi group is allowed to march through Skokie, Illinois, a predominantly Jewish community).

[22] *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (striking down ordinance that gave mayor power to grant or deny applications to publishers for annual permits to place newsracks on public property) (four justices constitute a majority in this case because Chief Justice Rehnquist, and Justice Kennedy did not take any part in the consideration or decision); City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (holding that school board meeting held open to the public could not exclude teachers); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147 (1939) (striking down city ordinances that forbade distribution of leaflets).

[23] *See* Martin v. City of Struthers, 319 U.S. 141 (1943). This case is recognized as the first articulation by the Supreme Court of the right to receive information. The Court based the right to receive information on a model of the First Amendment in which public debate was deemed essential if enlightenment was ever to triumph over ignorance. *Id.* at 143.

[24] Rene L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response*

particular, the prior restraint doctrine assumes that restricting speakers prior to the dissemination of their speech is the primary evil at which the First Amendment is aimed.[25] The communicator-oriented approach becomes a problem when potential listeners claim a First Amendment right to hear the words of willing speakers.

This problem has been evidenced by recent efforts of media organizations to challenge judicial orders that restrict the freedom of speech of trial participants, including witnesses.[26] In such cases, members of the media assert a right to receive the speech of trial participants rather than a right to speak themselves. Most courts have responded to these challenges under traditional communicator-oriented prior restraint doctrine analysis.[27]

The current standard[28] for reviewing prior restraints was set forth in *Nebraska Press Association v. Stuart*.[29] According to the United States Supreme Court, a prior restraint on the press may be utilized to protect the integrity of criminal proceedings only if "the 'gravity of the evil'" justifies such an invasion of free speech "'as is necessary to avert the danger.'"[30] In applying this test, a trial court must consider: "(a) the nature and extent of

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to Media Challenges of Gag Orders Directed at Trial Participants, 88 MICH. L. REV. 1171, 1171 (1990).

[25] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) (in striking down an injunction against the publication of a newspaper that criticized local officials, the Court stated that the primary goal of the First Amendment was to prevent prepublication restraints).

[26] *See* Butterworth v. Smith, 494 U.S. 624 (1990) (challenger was both a member of the press and a trial participant); Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (challenger was a media source attempting to obtain interviews with jurors); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (network broadcasting station challenged restrictive order enjoining discussions of case); Connecticut Magazine v. Moraghan, 676 F. Supp. 38 (D. Conn. 1987) (media source sought preliminary injunction enjoining enforcement of order prohibiting attorneys in state criminal matter from making statements to the media).

[27] *See* cases cited *supra* note 26.

[28] The prior restraint doctrine can be traced back to the case of Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931). In that case, the Supreme Court struck down a statute that allowed the state to enjoin the publication of malicious, scandalous, and defamatory newspapers. *Id.* at 701–02. The Court held that the chief purpose of the freedom of press guarantee was to prevent previous restraints on publication. *Id.* at 713.

[29] 427 U.S. 539 (1976). This opinion is famous for its statement that "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time." *Id.* at 559 (citing ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975)).

[30] *Id.* at 562 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[31] The Court noted that prior restraints on publication bear a heavy presumption against validity.[32] The heavy constitutional presumption against prior restraints recognizes that prior restraints are inherently more harmful to free speech interests than other forms of regulation[33] because prior restraints allegedly endanger protected speech by inducing self-censorship,[34] by increasing the coverage of regulation,[35] and by delaying the dissemination of speech.[36] Thus, in application, the prior restraint test functions as a virtual ban on censorship of the press.[37]

Once a court decides that an action constitutes a prior restraint, the presumption in favor of free speech controls the outcome unless the circumstances surrounding the prior restraint are compelling.[38] Subsequent punishment for libel or slander, for example, is preferred to prior restraints because, in contrast to the immediate and irreversible sanctions imposed by prior restraints,[39] subsequent punishment delays the regulation's impact until all harm caused by the expression is known and all appellate review has been exhausted, thus reducing the chance of erroneous speech suppression.[40]

1. Butterworth v. Smith

In *Butterworth v. Smith*,[41] the United States Supreme Court was asked to review a Florida statute[42] prohibiting grand jury witnesses from disclosing their

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[31] *Id.*

[32] *Id.* at 558.

[33] *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

[34] Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 24–49 (1981).

[35] *Id.* at 49–63.

[36] *Id.* at 30–33.

[37] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[38] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

[39] *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975).

[40] *See Nebraska Press Ass'n*, 427 U.S. at 556–62.

[41] 494 U.S. 624 (1990).

[42] *Id.* at 627. The statute provides in pertinent part:

> (1)A grand juror . . . or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury . . . except when required by a court to disclose the testimony for the purpose of:

testimony after the end of the grand jury's term.[43] In its review of the case, the Court recognized that grand jury secrecy was important to safeguard a number of interests.[44] Included among these interests was a fear that witnesses who appeared before the grand jury would be less likely to testify fully and frankly if the proceedings were not kept secret, as these witnesses would not only be subject to retribution but to inducements as well.[45] The Court recognized that the invocation of grand jury interests is not "some talisman that dissolves all constitutional protections."[46] Instead, the Court recognized that grand juries are expected to "operate within the limits of the First Amendment."[47] Thus, the Court balanced the reporter's First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings, concluding that the interests advanced by the Florida statute were not sufficient to overcome the reporter's First Amendment right to free speech.[48]

In the *Butterworth* case, the Court examined its earlier ruling in the case of

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(a)Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b)Determining whether the witness is guilty of perjury; or

(c)Furthering justice.

(2)It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist or import, thereof, except when such testimony is or has been disclosed in a court proceeding . . . .

FLA. STAT. ch. 905.27 (1989).

[43] The respondent in this case was a reporter who, while writing a series of newspaper articles, obtained information relevant to alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department. *Butterworth*, 494 U.S. at 626. The reporter was called to testify about the allegations in front of a special grand jury convened as a part of the investigation. *Id.* At the proceeding, the reporter was informed that revealing his testimony in any manner could result in criminal prosecution for a violation of Florida Statute ch. § 905.27. *Id.* After the grand jury terminated its investigation, the reporter made plans to publish a news story about the subject matter of the investigation, including the reporter's own testimony and experiences in dealing with the grand jury. *Id.* at 628. Subsequently, the reporter filed a lawsuit seeking a declaration that the Florida statute was an unconstitutional abridgment of speech and seeking an injunction preventing the state from prosecuting him. *Id.*

[44] *Id.* at 630.

[45] *Id.*

[46] *Id.* (quoting United States v. Dionisio, 410 U.S. 1, 11 (1973)).

[47] *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 708 (1972)).

[48] *Id.* at 636.

Landmark Communications, Inc. v. Virginia,[49] wherein the Court reviewed a Virginia statute that made it a crime to divulge information regarding proceedings taking place before the state judicial review commission.[50] A newspaper publisher had been convicted of violating the statute after publishing an article identifying the state judge who was under investigation.[51] In *Landmark Communications, Inc.*, the Court found that the conviction violated the United States Constitution, concluding that the publication lay near the core of the First Amendment, and the interests advanced by imposing criminal sanctions were insufficient to justify the actual and potential prohibitions on freedom of speech and of the press which would follow.[52] Even though the Court assumed that the confidentiality of the judicial review proceedings served legitimate governmental interests, the Court observed that the state had "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."[53]

In contrast, in *Butterworth*, the reporter was prohibited from divulging information that was in his possession before he testified in front of the grand jury, not information that he may have obtained as a result of his presence at or participation in the proceedings of the grand jury.[54] The ban extended not only to the life of the grand jury but also into the indefinite future.[55] Thus, the potential for abuse of the Florida prohibition as a device to silence those who knew of unlawful conduct or irregularities on the part of public officials was apparent to the Court.[56] Also, the Court recognized, as it had in earlier cases, that when a person "'lawfully obtains truthful information about a matter of public significance,'" "'state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'"[57]

In *Butterworth*, Florida sought to punish the publication of information relating to alleged governmental misconduct; speech that has traditionally been recognized as lying at the core of the First Amendment.[58] To justify such

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[49] 435 U.S. 829 (1978).

[50] *Butterworth*, 494 U.S. at 631 (citing *Landmark Communications, Inc.*, 435 U.S. at 829).

[51] *Id.*

[52] *Id.* (citing *Landmark Communications, Inc.*, 435 U.S. at 838).

[53] *Id.* (citing *Landmark Communications, Inc.*, 435 U.S. at 841).

[54] *Id.* at 632.

[55] *Id.* at 635.

[56] *Id.*

[57] *Id.* at 632 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979); Florida Star v. B.J.F., 491 U.S. 524, 533 (1989)).

[58] *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978); Wood

punishment, Florida relied on an interest in preserving grand jury secrecy, but the Court was not persuaded that interest warranted a permanent ban on the disclosure by a witness of his or her own testimony, once a grand jury had been dismissed.[59] The Court also observed that "neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the states," imposed an obligation of secrecy "on grand jury witnesses with respect to their own testimony to protect reputation interests or any of the other interests asserted by Florida."[60] The Court noted that although Federal Rule of Criminal Procedure 6(e)(2), governing grand jury secrecy, expressly prohibits certain individuals from disclosing "matters occurring before the grand jury,"[61] the pertinent Advisory Committee Notes on Rule 6(e)(2) expressly exempt witnesses from the obligation of secrecy.[62] Thus, the Court found that some of the interests were not served at all by the Florida ban on disclosure and that those interests that were served were not sufficient to sustain the statute.[63]

C. *Analysis of California Legislation Under Prior Restraint Doctrine with Regard to Defendant's Fair Trial Interests*

Under the test set forth in *Nebraska Press Association*,[64] California Penal Code section 132.5 is an unconstitutional prior restraint[65] on the freedom of speech of the press. The legislation does not provide for the case-by-case analysis suggested by the *Nebraska Press Association* test but instead applies a broad prophylactic prohibition that tramples unnecessarily upon free speech in an effort to avert the dangers of prejudicial pretrial publicity. This publicity could be avoided in other ways. First, not every criminal case in the state of California will garner the kind of extensive pretrial news coverage that might jeopardize a defendant's Sixth Amendment rights, therefore, applying a broad prohibition against the selling of any information regarding a criminal occurrence unduly burdens free speech. Second, other judicial or legislative

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v. Georgia, 370 U.S. 375, 388–89 (1962).

[59] *Butterworth*, 494 U.S. at 632.

[60] *Id.* at 634–35.

[61] *Id.* at 635.

[62] *Id.*

[63] *Id.* at 635–36.

[64] *See supra* note 29 and accompanying text.

[65] Even though the legislation is not a prior restraint in the traditional sense of the doctrine, the legislation is a prior restraint in the fact that it censors speech prior to its dissemination and/or delays its dissemination to the media and to the public. Therefore, by analogy, the media would have a valid cause of action against the government under the prior restraint doctrine. *See* cases cited *supra* note 26 and accompanying text.

measures less inhibitory of free speech could be utilized to mitigate the damages of prejudicial pretrial publicity more effectively than California's legislation.[66] Third, California's legislation will not effectively prevent the threatened danger of prejudicial publicity. Although the legislation might discourage the media from providing financial incentives to witnesses willing to sell their testimony, it will not discourage the media from continuing to pursue witnesses willing to share their stories in order to garner publicity and fame. Unless California's interests in enacting the legislation are found to be compelling, then the presumption favoring the free speech interests of the media controls the outcome.

As the Court acknowledged in *Butterworth*,[67] the public has a right to know about the operations of the judicial branch, an agency of democratic government,[68] and law enforcement practices.[69] The press, in turn, has an interest in reporting about the judiciary's performance as reflected in such areas as trial management and the integrity of judges.[70] Giving the media free reign in reporting contributes to the public's understanding of the legal system's mechanics and provides the public with a means of assessing the quality of the criminal justice system.[71] The media has a valid interest in asserting its freedom to publish a witness's story prior to the witness giving his or her testimony because doing so enables the public to gain information and understand the judicial system. Dissemination of such information about the judicial system would also encourage the public to scrutinize the witness's published story and thereby enable the public to assess the witness's credibility.

Witnesses also have interests in protecting their right to speak freely and

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[66] *See infra* note 81 and accompanying text.

[67] *See* discussion *supra* part II.B.1.

[68] The right to know about the operation of the government, including the court system, derives from the First Amendment right to receive information. *See In re* Express-News Corp., 695 F.2d 807, 809 (5th Cir. 1982).

[69] The Constitution's structure contemplates that:

> the processes of law enforcement be open to the public view, both for the purpose of protecting the innocent and bringing the guilty to boot and for the purpose of exposing incompetence, venality, or corruption on the part of those who arrest and prosecute and those who may sit in the seats of judgment.

See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FINAL REPORT OF THE SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL 49 (1967).

[70] *See generally* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

[71] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

publicly about the government, including the judiciary. Many witnesses utilize their free speech rights to comment publicly on pending trials. Analytically, their First Amendment speech interests differ little from those of the press. Motivations to speak openly about government range from the libertarian's interest in free expression to the reformer's desire to bring about political change by raising public awareness of injustices. Prohibitions that restrict witnesses' comments raise many free speech concerns because they are involuntarily haled into court. One element of these prohibitions, however, is particularly menacing. Because the government is given wide latitude to call as witnesses all those who conceivably have any knowledge about a criminal occurrence, prohibitions against public commentary about such proceedings potentially stifle a wide range of public opinion.[72] Similarly, the California legislation may hinder a wide range of public commentary because the legislation is written in so broad a manner as to include anyone who has witnessed or has personal knowledge of a criminal event or occurrence in the state of California, whether or not the person is a material witness.[73] Thus, the legislation unnecessarily tramples upon the free speech interest of each and every person who may be called as a witness in a criminal prosecution without regard for the fact that each case may not generate much public interest or prejudicial publicity.

The witness's and the media's interests must be balanced with the criminal defendant's Sixth Amendment right to a public trial by an impartial jury[74] and with the government's interest in ensuring that the defendant's rights are protected. Bias created by press coverage may undermine the public's

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[72] *See* 2 STANDARDS FOR CRIMINAL JUSTICE, Standard 8-3.6 & commentary at 8.54–.55 (2d ed. 1980); *cf.* Butterworth v. Smith, 494 U.S. 624, 635 (1990) (ability to prevent grand jury witnesses from discussing their testimony after the conclusion of the grand jury proceedings presents the "potential for abuse . . . through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials. . . ."). *But cf.* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). ("Neither . . . the accused [nor] witnesses . . . should be permitted to frustrate [the court's] function" of providing a trial by a jury free from outside influences.).

[73] *See* CAL. PENAL CODE § 132.5(b) ("[a] person who is a witness to an event or occurrence . . . that he or she knows or reasonably should know may require that person to be called as a witness in a criminal prosecution"). For text from this statute, see *supra* note 2.

[74] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."). This right is generally referred to as the right to a fair trial. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("The Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights . . . .").

confidence in the legitimacy of verdicts[75] and may cause the defendant to question the fairness or impartiality of the jury's decision. Prejudicial information can reach the jury through statements made to the press by officers of the court, attorneys, witnesses, jurors, and the police.[76] Also, the publicity surrounding spectacular trials may create an atmosphere in which jurors almost certainly enter into deliberations with preconceived notions concerning the defendant's guilt or innocence[77] or a witness's credibility.

The Supreme Court has responded to threats against a defendant's right to a fair trial by urging courts to guard more vigilantly against trial prejudice.[78] *Sheppard v. Maxwell*[79] serves as a starting point for courts considering the judiciary's role in limiting bias:

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances . . . . But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect the processes from prejudicial outside interferences.[80]

However, both practically and legally, prejudicial publicity usually does not pose a serious threat to a criminal defendant's fair trial guarantee. Prejudicial publicity only occurs in the most extreme of circumstances. When circumstances are extreme, several preventive measures may be implemented that may be more effective and less oppressive than the California statute: extensive voir dire examination of jurors, change of venue, judicial instructions

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[75] *See* United States v. Tijerina, 412 F.2d 661, 667 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (quoting Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.")).

[76] *See* American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* (1968); Richard B. Hirst Comment, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595, 604, 607 (1971).

[77] *See* United States *ex rel.* Bloeth v. Denno, 313 F.2d 364, 372–73 (2d Cir. 1962) (en banc), *cert. denied*, 372 U.S. 978 (1963).

[78] *See* Sheppard v. Maxwell, 384 U.S. 333, 360–61 (1966). The Court observed that the problem of prejudicial pretrial publicity could have been avoided by sequestering the jury for the length of the trial. *Id.* at 363.

[79] *Id.*

[80] *Id.* at 362–63.

not to read or watch press reports, and sequestration of the jury during the trial may all help to ensure that the jury stays neutral.[81] When trial publicity does reach jurors, the defendant's right to an impartial jury is not necessarily violated because the Constitution does not require a perfect trial.[82] Recognition of the practicalities involved in trial management[83] and acknowledgment of jurors' abilities to render impartial verdicts, even after exposure to possibly prejudicial information, allows for some potentially biased information to reach jurors without impugning the verdict's integrity.[84] For example, in *Irvin v. Dowd*,[85] the Supreme Court found that a juror's preconception about the guilt or innocence of an accused does not necessarily destroy that juror's neutrality if the juror can put aside his or her impression or opinion and render a verdict based solely upon the evidence presented in court.[86] The test is whether the nature and strength of the opinion formed raises questions regarding partiality,[87] and the burden of proving actual bias lies with the challenger.[88] This test is a difficult one to satisfy;[89] a defendant has an insurmountable task in proving that he or she has been denied the right to a fair trial.

Checkbook journalism may encourage a witness, in exchange for financial compensation, to publicize information that he or she would otherwise share only with authorities and while testifying in the courtroom. This could result in excessive prejudicial publicity and could create a compelling governmental interest in protecting a criminal defendant's right to a trial by an impartial jury.

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[81] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563–65 (1976); *Sheppard*, 384 U.S. at 362–63. *See also* Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063 (1992).

[82] *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) ("'[A litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials.") (citing Brown v. United States, 411 U.S. 223, 231–32 (1973) (quoting Brunton v. United States, 391 U.S. 123, 135 (1968) and Lutwak v. United States, 344 U.S. 604, 619 (1953))).

[83] *Id.*

[84] Exposure to some inadmissible information usually constitutes harmless error; reversals on the grounds that prejudicial publicity deprived a defendant of his or her Sixth Amendment rights are rare. *See* Irvin v. Dowd, 366 U.S. 717, 723 (1961).

[85] 366 U.S. 717 (1961).

[86] *Id.* at 723.

[87] *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 156 (1878)).

[88] *Id.*

[89] *See* Scott C. Pugh, Comment, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. PA. L. REV. 1739, 1749–50 (1995) (discussing two United States Supreme Court cases that cast doubt on the continued validity of using presumptive bias as a means of proving a violation of the right to a fair trial and concluding that the standard for proving jury prejudice is impossible to satisfy).

However, in light of the Supreme Court's interpretation of the Sixth Amendment,[90] a defendant is faced with an insurmountable task when attempting to prove that the level of juror prejudice has compromised his or her Sixth Amendment rights. The fair trial interest embodied in the Sixth Amendment does not require that a jury be entirely unfamiliar with a case but rather requires that the jury be able to set aside any preconceived impressions to render a verdict based on the evidence presented in court. Other methods, less intrusive upon free speech, are available to ensure that a jury does not enter a courtroom with preconceived notions about the criminal defendant. These methods, including voir dire examination, change of venue, and jury sequestration, when imposed by trial judges on a case-by-case basis are more narrowly tailored to prevent the harm of prejudicial publicity than this legislation. Therefore, California Penal Code section 132.5 is not narrowly tailored to address prejudicial publicity concerns.

Furthermore, not all witnesses will have knowledge of information that inculpates defendants. Indeed, witnesses may possess information that exculpates criminal defendants, and thus, the selling of these witnesses' accounts to the media cannot be said to create the kind of prejudicial publicity that would taint the jury and cause fair trial concerns for criminal defendants. Moreover, utilizing a broad prohibition on speech, such as California's statute, may preclude speech which would contribute to public debate about the criminal process and its questionable treatment of criminal defendants.

III. CONTENT-BASED REGULATIONS

In scrutinizing a statute that prohibits the First Amendment freedom of speech, courts classify the restriction as content-based or content-neutral.[91] A court's conclusion that a statute is content-based[92] or content-neutral[93] is dispositive of the level of scrutiny that the court will apply in ruling on the constitutionality of the statute.[94] A statute that restricts the exercise of free

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[90] *See supra* note 82 and accompanying text.

[91] Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991).

[92] A content-based restriction is a statute or regulation that singles out speech with a particular substantive content or message. Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984).

[93] A content-neutral restriction is a statute or regulation that restricts speech in a nondiscriminatory way, *i.e.*, regardless of its content. *See* Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2523 (1994).

[94] Elizabeth Buroker Coffin, *Constitutional Law: Content-Based Regulations on Speech: A Comparison of the Categorization and Balancing Approaches to Judicial Scrutiny*—Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S. Ct. 501

speech based on the content of the speech will be considered constitutional only if the statute passes the strict scrutiny test.[95] Under the strict scrutiny test, three elements must be satisfied by the proponent of the statute at issue. First, when speech is fully protected under the First Amendment, the government cannot regulate the speech based on its content, even if the speech is harmful, unless the regulation is necessary to advance a compelling governmental interest.[96] Second, the regulation must be narrowly tailored to accomplish this compelling governmental interest, meaning that a "tight fit" must exist between the speech's harm and the means used to prevent that harm.[97] Finally, no less restrictive alternative means of furthering this interest must exist.[98] The strict

(interim ed. 1991), 18 U. DAYTON L. REV. 593, 612 (1993). The Court's scrutiny is less severe when the speech restriction is content-neutral. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (upholding a concert noise regulation in Central Park, stating that "a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so").

[95] *See* Widmar v. Vincent, 454 U.S. 263, 269–70 (1981) (defining strict scrutiny); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (plurality opinion) (finding the statute that prohibited the displaying of a sign within 500 feet of a foreign embassy when the sign brought disrepute upon the foreign government failed the strict scrutiny test because even though the interest may have been compelling, more narrowly drawn measures could have been used).

[96] *See, e.g., Boos*, 485 U.S. at 321; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (finding that law prohibiting corporations from spending money to influence the vote on any referendum, considered protected expressive activity, that did not materially affect the corporation's business failed strict scrutiny because the government's interest in preventing corporations from dominating the political process was not compelling and the statute was not narrowly drawn). *But see* R.A.V. v. St. Paul, 503 U.S. 377 (1992) (stating that speech is unprotected and content discrimination is allowed when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable).

[97] *See generally* Rutan v. Republican Party of Illinois, 497 U.S. 62, 71–75 (1990) (invalidating an executive order that instituted a hiring freeze, whereby state officials were prohibited from hiring any employee, filling any vacancy, or creating any new position without the governor's permission because these practices were not narrowly tailored to serve vital governmental interests); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (striking down a statute that required every publicly-employed teacher to list annually every organization to which he or she had belonged or regularly contributed within the preceding five years because the means chosen were not narrowly tailored).

[98] *See generally Rutan*, 497 U.S. at 71–75 (finding that preservation of the democratic process could be met by less restrictive means, including discharging, demoting, or transferring persons whose work was deficient and finding that interests in employing persons who would loyally implement the party's policies could be served by choosing or dismissing high level employees based on their political views); *Shelton*, 364 U.S. at 488

scrutiny test applied to content-based regulations on fully-protected speech is a balancing test, with a presumption that the speech is protected. In applying this balancing test, the courts have recognized the need to consider valid governmental interests in regulating certain kinds of speech.[99]

A. Simon & Schuster, Inc. v. Members of New York State Crime Victims Board

In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,[100] the Supreme Court considered the constitutionality of New York's criminal anti-profit or "Son of Sam"[101] law.[102] Simon & Schuster challenged New York Executive Law section 632-a,[103] on the grounds that the law was an unconstitutional burden on the First Amendment's guarantee of freedom from content-based restrictions on speech.[104]

(1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 164 (1939) (striking a ban on the distribution of leaflets because a less restrictive alternative was available to prevent littering).

[99] *See* GERALD GUNTHER, CONSTITUTIONAL LAW 997, 1007 (12th ed. 1991).

[100] 502 U.S. 105 (1991).

[101] David Berkowitz, who was determined to be the killer, left notes at the scenes of his crimes signed "Son of Sam." *See Police Get a 2d Note Signed by Son of Sam in .44-Caliber Killings*, N.Y. TIMES, June 3, 1977, at 2.

[102] The law requires that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account. These funds would then be made available to victims of the crime and the criminal's other creditors. This law was passed in the aftermath of the capture of serial killer "Son of Sam." *See Simon & Schuster, Inc.*, 502 U.S. at 108; *see also* Gregory G. Sarno, Annotation, *Validity, Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R. 4th 1210, 1211–13 (1991).

[103] N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1995). This law was enacted in 1977 in response to a rumor that the serial killer, the "Son of Sam," would become wealthy by telling the story of his crimes to reporters, publishers, and literary agents. *See Case Holds Potential for Books and Films*, N.Y. TIMES, Aug. 14, 1977, at 44. Section 632-a provides that any person or entity who contracted with an individual accused or convicted of a crime in New York to reenact the crime or to convey the person's thoughts, feelings, opinions, or emotions regarding the crime has to submit a copy of the contract to the New York State Crime Victims Board. N.Y. EXEC. LAW § 632-a. The contracting party was required to pay to the Board all proceeds. *Id.*

[104] *Simon & Schuster, Inc.*, 502 U.S. at 115. The challenge to the statute arose out of a contract between Simon & Schuster, a publishing company, and Henry Hill, a mobster convicted for narcotics trafficking. *See* George F. Will, *A Man for the Mob*, WASH. POST,

In scrutinizing the New York statute, the Supreme Court reasoned that a statute is presumptively inconsistent with the First Amendment if the statute imposes a financial burden on speakers because of the content of their speech.[105] This rule is "but one manifestation of a far broader principle: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'"[106] The Court concluded that New York's "Son of Sam" law was a content-based regulation by reasoning that the statute singled out income derived from expressive activity for a burden that the state placed on no other income, and the burden was directed only at works with a specified content.[107] If a criminal derived financial gain from the sale of his or her expressive work that did not contain any reference to his or her crime, then these funds would not fall within the scope of the statute.[108] The Court deemed inconsequential the issue of whether the "speaker" was the criminal or Simon & Schuster.[109] Furthermore, the Court held that section 632-a imposed a financial disincentive only on speech of a particular content.[110] Thus, the Court stated that placing a financial burden on specified speech was tantamount to preventing speech.[111] The Board argued that because the statute at issue applied to any "entity" and not specifically to the media, the restriction was not prohibited by the First Amendment,[112] but the Court responded that entities that contract with criminals for the expression of their thoughts and emotions become a medium of communication per se.[113]

The conclusion by the Court that the statute established a financial

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Mar. 23, 1986, at F7. In 1981, Simon & Schuster began plans to publish a book on organized crime in New York City. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 724 F. Supp. 170, 172 (S.D.N.Y. 1989), *aff'd sub nom.* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991). Simon & Schuster struck a deal with Henry Hill in which he would reveal the details of his life to an author assigned to write the book. *New York State Crime Victims Bd.*, 724 F. Supp. at 172. Subsequently, the New York State Crime Victims Board learned of the deal and demanded that Simon & Schuster provide the Board with copies of all contracts and information regarding payments Simon & Schuster had made to Hill and requested that Simon & Schuster suspend all future payments to Hill. *Fischetti*, 916 F.2d at 780.

105 *Simon & Schuster, Inc.*, 502 U.S. at 115.

106 *Id.* at 116 (quoting Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984)).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 117.

112 *Id.*

113 *Id.*

disincentive to create or publish works of a particular content indicated that strict scrutiny was the proper standard of constitutional review.[114] The application of this standard required New York to show that its regulation was necessary to serve a compelling governmental interest which was narrowly drawn to achieve that interest.[115] The Court found that New York had compelling governmental interests in ensuring that crime victims were fully compensated by those who harmed them and in ensuring that criminals did not profit as a result of their crimes.[116] However, the Court found that the Board's interest in securing profits derived from storytelling was no greater than the Board's interest in securing other assets owned by the criminal.[117] Furthermore, the Court also determined that the Board was unable to demonstrate how restricting such storytelling furthered New York's interest in transferring "the fruits of crime" from criminals to their victims.[118] Thus, the Court concluded that although New York had a compelling interest in compensating victims from the fruits of a crime, New York could not adequately explain why such compensation should be limited to the proceeds from the wrongdoer's speech about the crime.[119]

In analyzing the statute, the Court next inquired whether New York had used a narrowly tailored means of furthering its interests in compensating victims of crime and in preventing criminals from profiting from their crimes.[120] The Court held that the means provided for by section 632-a were overinclusive and that the statute was thus not sufficiently narrowly tailored to withstand strict scrutiny.[121] First, the Court found that the statute applied to all works that expressed a criminal's thoughts, emotions, or recollections, even if mentioned only tangentially.[122] Thus, the theoretical scope of the statute rendered it overbroad.[123] Second, section 632-a's broad definition of a person convicted of a crime allowed the Board to place into escrow proceeds derived from any author's work if the author admitted that he or she had committed a crime, regardless of whether the author was ever convicted or even accused of

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[114] *Id.* at 118.

[115] *Id.*

[116] *Id.* at 118–19. The Court stated that the former interest is a valid one served in every state by its tort laws and that the latter interest is a basic equitable principle that has been formally recognized by the law. *Id.* at 119 (citing Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889)).

[117] *Id.* at 119.

[118] *Id.*

[119] *Id.* at 120–21.

[120] *Id.* at 121.

[121] *Id.* at 122 n.**.

[122] *Id.* at 121.

[123] *Id.* at 121–22.

the crime.[124] Lastly, the Court pointed to the impact of section 632-a on statutes of limitation[125] as further evidence that the law was not sufficiently narrowly tailored to effectively further New York's interest in compensating victims through the use of the fruits of crime.[126] The Court found that section 632-a was not narrowly tailored enough to achieve the state's compelling interests, and thus, it failed the second part of the strict scrutiny test.[127] Therefore, the Court unanimously[128] held that New York Executive Law section 632-a was an unconstitutional burden on the First Amendment's guarantee of freedom from content-based restrictions on speech.[129]

B. *Analysis of California Legislation Regarding the Content-Based Regulation Standard*

California's legislation, California Penal Code section 132.5, restricting the practices of checkbook journalism, is similar in many respects to New York's "Son of Sam" law. Like the "Son of Sam" law, the California statute discriminates against speech based on its content. The California statute places a financial burden, in the form of a disincentive to speak to the media, on speech of a particular content, that of a criminal event or occurrence.[130] Furthermore, while witnesses are permitted to give information to the media, they are prohibited from receiving payment for doing so.[131] Thus, California's legislation is a classic example of the type of content-based regulation that the United States Supreme Court in *Simon & Schuster* pronounced to be a content-based regulation, presumptively inconsistent with the First Amendment.[132]

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[124] *Id.* at 121. The Court postured that had the law been in effect at the time and place of publication, the law would have escrowed payment for *The Autobiography of Malcolm X*, which discusses crimes committed by the civil rights leader before he became a known figure, and *Civil Disobedience*, in which author Henry David Thoreau recounts tax evasion and jail time. *Id. See* A. HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964); H. DAVID THOREAU, CIVIL DISOBEDIENCE (1849, reprinted 1969).

[125] *Id.* at 123. The Court reasoned that if a prominent figure wrote his or her autobiography at the end of his or her career and included a confession to stealing in the beginning of the book, the Board would control the author's income from the book for five years thereafter and would avail the author's creditors of that income, despite the fact that the statute of limitations for the criminal incident had expired. *Id.*

[126] *Id.*

[127] *Id.* at 123.

[128] Justice Clarence Thomas did not participate in the decision. *Id.*

[129] *Id.*

[130] *See* CAL. PENAL CODE § 132.5(b)–(c). For text from this statute, see *supra* note 2.

[131] *See* CAL. PENAL CODE § 132.5(a). For text from this statute, see *supra* note 2.

[132] *See supra* notes 105–07 and accompanying text.

Because the legislation is a content-based regulation, the legislation must be analyzed under the three-pronged strict scrutiny standard. First, California's primary interest in enacting the legislation is to protect the criminal defendant's right to a fair trial.[133] Witnesses who sell their stories to the media may be tempted to lie or embellish their stories in order to take advantage of media sensationalism to maximize their profits. One problem that arises is that a witness who is paid for divulging his or her story to the media prior to testifying may feel compelled to stand by this earlier embellished story when in court. Thus, false testimony may be proffered in court proceedings. Another concern is that jurors may view witnesses that sell their stories to the media as having sold embellished or untruthful information and thus discount the credibility of their court testimonies. Therefore, the California legislation may be viewed as a necessary means of achieving the goal of preventing witnesses from giving dishonest testimony or discouraging jury disbelief of witnesses, thereby ensuring that the government achieves its compelling interest in protecting defendants' Sixth Amendment rights. The government has met the first prong of the strict scrutiny standard.

Under the second prong of the strict scrutiny standard, the government must prove that the legislation is narrowly tailored to achieve its compelling interest; a tight fit must exist between the speech's harm and the means used to prevent that harm from occurring. Moreover, a less restrictive means of furthering the government's interest must not exist. The threat of dishonest testimony and jury distrust of witnesses who sell their stories to the media can be mitigated by measures that are less intrusive upon free speech interests and that are more narrowly tailored than section 132.5.

One of these measures is cross-examination. One of the primary functions of a jury is to assess the credibility of witnesses. Other types of witnesses, besides media-paid witnesses, have financial incentives to lie or embellish their stories but are not kept from testifying because of these incentives. These witnesses include expert witnesses and plea bargaining criminal defendants. An expert witness is generally paid for his or her testimony.[134] A plea bargaining defendant offers testimony that aids the prosecution in exchange for clemency. The same interests that California is trying to protect through the enactment of its legislation are in question whenever a paid expert witness or a plea bargaining criminal defendant testifies in a court proceeding.[135] Yet, cross-examination is provided so that one can elicit the facts which diminish the

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[133] *See* CAL. PENAL CODE § 132.5(a). For text from this statute, see *supra* note 2.

[134] *See* FED. R. EVID. 706(b) (entitles court-appointed experts to reasonable compensation).

[135] *See* Chemerinsky, *supra* note 10.

personal trustworthiness of the witness.[136] Cross-examination enables an attorney to uncover a witness's biases, prejudices, or personal interests in the outcome of a court proceeding. Moreover, "cross-examination is the principal means by which the believability of a witness and the truth of his [or her] testimony are tested."[137] Furthermore, a witness may be cross-examined regarding any financial interests implicated in a case.[138] Anticipation of a grueling cross-examination may encourage an expert witness not to lie or embellish his or her testimony during direct examination. A plea bargaining defendant may be asked whether he or she has been granted immunity or special treatment by the prosecution because of his or her favorable testimony. Also, other safeguards exist, such as perjury prosecutions[139] and libel suits,[140] that further discourage dishonest testimony. Thus, jurors have the ability to determine whether expert witnesses or plea bargaining defendants are credible or whether financial incentives have rendered their testimonies unreliable.

In the same manner, cross-examination of a media-paid witness can help a jury to ascertain whether the witness's story remains credible despite the remuneration or whether the story is fabricated or exaggerated to exploit media sensationalism. The jury can assess factors such as the story's credibility, corroborating evidence or testimony, the witness's demeanor, and the consistency of the witness's story throughout dealings with authorities and with the media to determine the ultimate reliability of the witness's testimony.

If cross-examination sufficiently deters the inherent dangers in the induced testimony of expert witnesses and plea bargaining defendants, then it should also sufficiently deter the same inherent dangers in checkbook journalism.[141] When an expert witness receives money and a plea-bargainer receives clemency in return for his or her testimony, the government does not regulate the source

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[136] *See* 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1368, at 37 (Chadbourn ed., rev. ed. 1974).

[137] Davis v. Alaska, 415 U.S. 308, 316 (1974).

[138] *See* MCCORMICK ON EVIDENCE 22 (John W. Strong ed., 4th ed. 1992).

[139] *See, e.g.*, 18 U.S.C:A. § 1621(2) (1995) (perjury in federal court is punishable by a fine of not more than $2000 and imprisonment of up to five years).

[140] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (defining standards for cause of action for libel).

[141] *See* Pugh, *supra* note 89, at 1771. Indeed, in *People v. Simpson*, No. BA097211 (Cal. Oct. 3, 1995), the judge denied a motion to dismiss a witness who was paid $12,500 by a supermarket tabloid newspaper to share information that O.J. Simpson had purchased a knife at the cutlery store where the witness was employed. After the motion was denied, Simpson's attorneys attacked the witness's credibiliy on cross-examintion by questioning him about his dealings with the supermarket tabloid newspaper. *See* Pugh, *supra* note 89, at 1737.

of the inducement.[142] Instead, the government regards cross-examination as an effective means of discrediting unreliable testimony or dispelling the appearance of impropriety.[143] Similarly, cross-examination could alleviate fair trial concerns when checkbook journalism is involved.[144] Therefore, California Penal Code section 132.5 is neither narrowly tailored nor the least restrictive means of achieving the state's compelling interests in guaranteeing a criminal defendant a fair trial.

IV. SPECULATIVE HARM

A. United States v. National Treasury Employees Union

In *United States v. National Treasury Employees Union*,[145] the United States Supreme Court concluded that § 501(b) of the Ethics in Government Act of 1978[146] was unconstitutional under the Freedom of Speech Clause of the First Amendment because the speculative benefits that the statute's ban on honoraria would provide were not sufficient to justify the burden placed on respondents' freedom to engage in expressive activities.[147]

In its analysis of the honoraria ban, the Court determined that the ban's broad sweep placed a heavy burden on the government to prove its constitutionality.[148] The case did not involve a post hoc analysis of an employee's speech and its impact on the employee's public responsibilities but involved a deterrent to a broad category of expression by an enormous number of potential speakers.[149] Thus, the honoraria ban placed a heavy burden on speech because the ban deterred a massive amount of unspoken words based solely on the speculative fear that the speech might threaten governmental interests.[150] Furthermore, the Court recognized that, unlike adverse action taken in response to actual speech, the honoraria ban chilled potential speech

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142 *Id.* at 1771.

143 *Id.*

144 *Id.*

145 115 S. Ct. 1003 (1995).

146 5 U.S.C. App. § 501 (1994). "An individual may not receive any honorarium while that individual is a Member [of Congress], officer or employee [of the federal government]." *Id.* § 501(b). Congress defined "honorarium" as any compensation paid to a governmental employee for "an appearance, speech or article." *Id.* at § 505(3).

147 *National Treasury Employees Union*, 115 S. Ct. at 1010. Respondents represented a class composed of Executive Branch employees who, but for § 501(b), would receive honoraria for works about religion, history, dance, the environment, and the like. *Id.*

148 *Id.* at 1013.

149 *Id.*

150 *Id.* at 1013 n.11.

before it happened.[151] Therefore, the government had to prove that the interests of both potential audiences and present and future employees in a broad range of expression were outweighed by that expression's "necessary impact on the actual operation" of the government.[152]

The Court found that although § 501(b) neither prohibited speech nor discriminated amongst speakers based on the content or viewpoint of their messages, its prohibition on compensation imposed a significant burden on expressive activity.[153] Publishers, for instance, compensate authors, thereby providing a significant incentive toward more expression.[154] By denying this incentive, the honoraria ban forced the employees to abandon their expression if they desired to continue their employment with the government.[155]

The Court also recognized that such large-scale disincentive to express ideas by governmental employees imposed a significant burden on the public's right to receive the employees' expressive communications.[156] Although it had no way of measuring the true cost of this burden, the Court felt that the risk that the public might be deprived of a future famous novelist could not be ignored.[157]

Finally, the Court examined the government's underlying concern in imposing the honoraria ban. The ban was enacted to prevent federal officers from misusing or appearing to misuse their powers by accepting compensation for unofficial and nonpolitical writing and speaking activities.[158] The Court found the government's reliance on limited evidence of actual or apparent impropriety by legislators and high-level executives, together with the purported administrative costs of avoiding or detecting lower-level employees' violations of established principles, to be unreasonable.[159]

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[151] *Id.* at 1014 (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931)).

[152] *Id.* (quoting Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563, 571 (1968)).

[153] *Id.* (citing Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991)).

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1015 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976)).

[157] *Id.*

[158] *Id.* at 1011, 1015.

[159] *Id.* at 1016.

> [W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a

B. *Analysis of California Legislation Regarding Speculative Harm*

California Penal Code section 132.5, like the legislation at issue in *National Treasury Employees Union*, is written so broadly that it places a heavy burden on the government to prove its constitutionality. The legislation is not grounded in scientific studies of checkbook journalism's effect on jurors' perceptions of witnesses. Instead, the legislation is a far-reaching deterrent with a broad impact on a speculative future harm. The legislation prohibits checkbook journalism because it may cause the loss of credible evidence in criminal trials.[160] Thus, the legislation does not take adverse action in response to actual speech but chills potential speech before it happens. Under the *National Treasury Employees Union* test, proponents of section 132.5 must show that the interests of a vast number of people in freedom of speech are outweighed by the potential impact on the fair trial guarantee.[161]

Although California Penal Code section 132.5 does not prohibit speech per se, the legislation does impose a significant burden on expressive activity by prohibiting the receipt of monetary compensation. This disincentive, in turn, imposes a significant burden on the public's right to receive the witness's expressive communications. Thus, under section 132.5, the public is denied the opportunity to assess a witness's credibility, adjudge the judicial process, or possibly question the system's treatment of criminal defendants. According to the *National Treasury Employees Union* test, the greatest concern caused by the California legislation is its enactment in response to speculative harm. The Court has stated that when the government defends a regulation on speech as a means to prevent anticipated harm, it must demonstrate that the harm is real, and not merely conjectural, and that the regulation will directly alleviate that harm.[162] Here, California has passed section 132.5 in response to the Simpson double-murder case; a case that is unprecedented in the media coverage that it has spawned. Moreover, the harm caused by checkbook journalism in this case

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direct and material way.

Id. at 1017 (quoting Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2450 (1994). The Court cited Justice Brandeis for the statement that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women . . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." *National Treasury*, 115 S. Ct. at 1017 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion)).

[160] The exact wording is "the disclosure for valuable consideration of information relating to crimes by prospective witnesses can cause the loss of credible evidence." *See* CAL. PENAL CODE § 132.5(a). For text from this statute, see *supra* note 2.

[161] *See supra* note 152 and accompanying text.

[162] *See Turner Broadcasting Sys.*, 114 S. Ct. at 2450.

is merely conjectural because this legislation was enacted before the verdict was handed down and before the jury was questioned about its impressions of the media-paid witnesses. Therefore, the harm caused by checkbook journalism practices is too speculative to warrant the enactment of legislation that restricts such a fundamental right as that of freedom of speech.

V. CONCLUSION

California Penal Code section 132.5 is unconstitutional based on three freedom of speech doctrines. First, the statute is a prior restraint on both the media and witnesses that hinders public scrutiny of the judicial process. Although the government has a compelling interest in protecting the rights of a criminal defendant to a fair trial by restricting prejudicial pretrial publicity, other less intrusive means of achieving this goal can be utilized. These means, including jury voir dire, change of venue, special jury instructions, and jury sequestration, can be used on a case-by-case basis. Second, the legislation is an unconstitutional content-based regulation because although the government's interests in preventing dishonest testimony and juror distrust of witnesses who sell their stories to the media are compelling, these same goals can be achieved by the less restrictive means of cross-examination. Third, the speculative benefits that the legislation provides in protecting a criminal defendant's right to a fair trial are insufficient to justify such a heavy burden on freedom of speech. Instead, the constitutional guarantee to free speech should be seen as harmonizing with the constitutional guarantee to a fair trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."[163]

[163] Globe Newspaper v. Superior Court, 457 U.S. 596, 606 (1982).